

[Cite as *State v. Flynn*, 2010-Ohio-3191.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93588

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RALPH FLYNN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520679

BEFORE: Blackmon, J., Gallagher, A.J., and Rocco, J.

RELEASED: July 8, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Ralph Flynn appeals his conviction as a result of a guilty plea and assigns the following error for our review:

“The trial court erred in accepting defendant’s guilty plea, as said plea was not entered knowingly, voluntarily, and intelligently because of the trial court’s failure to advise the defendant that, should he decide not to testify at trial, no one could comment on the defendant’s failure to testify.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Flynn’s conviction. The apposite facts follow.

Facts

{¶ 3} The Cuyahoga County Grand Jury indicted Flynn for two counts of rape, two counts of sexual battery, and one count of kidnapping, all with sexually violent predator specifications. Flynn entered a plea of guilty to one count of rape, and in exchange, the remaining counts and specifications were dismissed.

{¶ 4} After the first plea hearing was conducted, the trial court discovered that it had incorrectly advised Flynn as to the mandatory nature of his sentence and postrelease control. Therefore, the trial court conducted another plea hearing, where it again went through the rights Flynn was waiving; Flynn again entered the plea and a sentencing hearing was scheduled for a later date. At the sentencing hearing, Flynn orally motioned

to withdraw his plea; he wished to hire an attorney referred to him by a friend to argue the motion. At the time, he had assigned counsel. After continuing the matter several times for Flynn to obtain representation for his motion, the court allowed Flynn to argue his withdrawal motion himself. Flynn argued the basis for his motion was that he was innocent. The trial court denied the motion and sentenced Flynn to six years in prison. The court also classified him as a Tier III sexual offender.

Invalid Guilty Plea

{¶ 5} In his sole assigned error, Flynn argues that the trial court erred by accepting his plea because the trial court failed to properly advise him of his privilege against compulsory self-incrimination.¹

{¶ 6} The underlying purpose of Crim.R. 11(C) is for the court to give enough information to a defendant to allow him to make an intelligent, voluntary, and knowing decision of whether to plead guilty. See *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115. Courts have divided Crim.R. 11 rights into constitutional and nonconstitutional rights. Concerning the constitutional rights, courts must strictly comply with Crim.R. 11 mandates; for the nonconstitutional rights, the standard is

¹We note this was not the basis for his presentence motion to withdraw his plea.

substantial compliance. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, at ¶15; *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163.

{¶ 7} Pursuant to *Boykin v. Alabama* (1969), 395 U.S. 238, 242-243, 89 S.Ct. 1709, 23 L.Ed.2d 274, the privilege against compulsory self-incrimination is a constitutional right that requires strict compliance. Our review of the record indicates that at both plea hearings, the trial court asked Flynn whether he understood that by pleading guilty, he was “giving up [his] right to remain silent.” The court did not use the phrase “cannot be compelled to testify” as set forth in Crim.R. 11(C) in explaining the right; however, the Ohio Supreme Court has held that for strict compliance, “a rote recitation of Crim.R. 11(C) is not required and failure to use the exact language of the rule is not fatal to the plea.” *Ballard*, at 480.

{¶ 8} Although the trial court need not use the exact language contained in Crim.R. 11(C), the trial court must explain these constitutional rights “in a manner reasonably intelligible to that defendant.” *Ballard*, at paragraph two of the syllabus; *State v. Ortiz*, Cuyahoga App. No. 91626, 2009-Ohio-2877. Flynn contends that the trial court was required to explain that his right against compulsory self-incrimination would prevent the state from commenting upon his decision to not testify. However, we conclude

there was no duty on the court to so advise Flynn. The court needed only to explain his constitutional rights in a manner “reasonably intelligible” to Flynn. By telling him he was waiving his right to remain silent, the court complied with Crim.R. 11(C)’s requirement that the defendant be advised he was waiving his privilege against compulsory self-incrimination.

{¶ 9} In a similar case, *State v. Giovanni*, 7th District No. 08 MA 150, 2009-Ohio-3333, the Seventh District held that the court had no duty to explain that the privilege against compulsory self-incrimination not only meant the defendant had the right to remain silent, but also that the state was prohibited from commenting on the defendant’s failure to testify at trial. Flynn argues that *Giovanni* is distinguished because in that case, along with the defendant entering an oral plea, the plea was also placed in writing. However, the Seventh District did not base its decision on the fact the plea was placed in writing. The court held no explanation was necessary because Crim.R. 11(C) did not require that the defendant be told in conjunction with his waiver of the privilege that it meant the state could not comment on his failure to testify. The Seventh District in *State v. Ingram*, 7th Dist. No. 09 MA 98, 2010-Ohio-1093, recently reaffirmed this principle, again holding that Crim.R. 11(C) does not require such an explanation.

{¶ 10} Likewise in *State v. Moorefield* (Oct. 8, 1999), 2nd Dist. No. 98-CR-26, 99CA4, the Second District held that advising a defendant at a plea hearing that he waives his right to “remain silent” explains the right in a “functional sense,” which was sufficient to explain the right in a reasonably, intelligible manner. This court in *State v. Butcher* (Oct. 7, 1985), Cuyahoga App. No. 49642, also held that the court’s advising the defendant he was waiving his “right to remain silent” was sufficient to explain the privilege against compulsory self-incrimination. Accordingly, Flynn’s first assigned error is overruled.

Judgment is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS;

KENNETH A. ROCCO, J., CONCURRING
WITH SEPARATE OPINION ATTACHED

KENNETH A. ROCCO, J., CONCURRING:

{¶ 11} I agree with the majority’s decision in this case, but write separately to note an issue for future consideration in a case in which it is properly raised.

{¶ 12} The trial court in this case informed appellant that, by pleading guilty, he was “giving up [his] right to remain silent.” The phrase “the right to remain silent,” made familiar by the United States Supreme Court’s decision in *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, arises in the context of custodial interrogation, in which the element of compulsion necessarily is already present. I am not convinced that the use of that phrase is adequate to inform a defendant that he cannot be compelled to testify at his own trial. In this case, however, the appellant did not raise this issue. Therefore, I leave this question to future consideration.